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ICE ANNOUNCES NATIONWIDE I-9 AUDITS AGAINST TARGETED EMPLOYERS

On July 1, 2009, officials of U.S. Immigration and Customs Enforcement (ICE), an agency within the Department of Homeland Security (DHS), announced that it was issuing I-9 inspection notices to 652 employers nationwide in an effort to crack down on employers who knowingly employ illegal workers. Officials said employers were selected for investigation based on leads and information obtained through other investigative means.

Beginning in 2006, ICE announced the intent to bring criminal prosecutions against employers who violate the nation's immigration hiring laws. Although ICE raids garnered substantial publicity, the vast majority of employers had no contact with ICE agents because they had ceased conducting routine I-9 audits.

Today, I-9 audits have become a significant investigative tool against targeted employers. In the process of serving the Notice of Inspection (NOI), agents typically question employer representatives about the number of employees, hours of operation, and I-9 practices. Because public contact personnel and supervisors can be intimidated by the presence of armed agents and may feel compelled to answer questions to demonstrate their willingness to cooperate, employers are well advised to establish policies and procedures instructing them to refer all questions posed by government agents to a responsible company official or attorney.

An employer may want to consult counsel to discuss problems and concerns prior to producing I-9 forms and other documents that may implicate the employer in knowing hire or criminal violations. Decisions on the scope of the employer's production require full and frank consultations with counsel experienced in handling immigration-related investigations. Counsel may also propose pre-production corrective actions designed to eliminate or reduce potential fines and penalties.

After inspecting the employer's I-9 forms, ICE may serve the company with a Notice of Suspect Documents (NOSD), listing employees whose identity and work authorization documents contain information that fails to match information contained in DHS databases. The employer is required to re-verify the identity and work eligibility of all employees on the NOSD, preferably through the use of different documents not containing the suspect data, and to report the results to ICE within a short time frame. ICE may also serve the employer with the names of employees who are not authorized to work in the United States and instruct the employer that continuing to employ such persons could result in civil fines and/or criminal prosecution.

If ICE detects technical errors in the I-9 forms, ICE is required to give notice of the errors and provide a 10-day opportunity to correct and return them to ICE. No notice and opportunity to correct is provided for substantive errors, such as the failure to complete an I-9 or the failure to record any documents evidencing identity and eligibility to work.

At the conclusion of the audit, the employer may be served with a Notice of Intent to Fine (NOIF), listing all paperwork and hiring violations detected in the audit and the proposed civil money penalties for each violation. Paperwork fines range from \$110 to \$1100 per I-9. Fines for knowing hire (or continuing to employ) violations range from \$375 to \$3200 per unauthorized worker. If the employer wishes to contest either the violations or the amount of the fines, it must serve a written request for a hearing within 30 days. Failure to do so converts the NOIF into a final order enforceable in court. If the employer requests a hearing, the matter is referred to ICE counsel, which then must file a complaint with the Office of the Chief Administrative Hearing Officer, Executive Office for Immigration Review, U.S. Department of Justice (OCAHO).

For information regarding I-9 audits, employer rights and responsibilities, agent conduct, ICE notices and OCAHO hearing procedures, please contact Mary E. Pivec at 202-434-4212 pivec@khlaw.com or Manesh Rath at 202-434-4182 rath@khlaw.com.

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